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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~525~~ 29

THE UNITED STATES,

Petitioner,

v.

CENTRAL EUREKA MINING COMPANY (a corporation),
ALASKA-PACIFIC CONSOLIDATED MINING COMPANY,
IDAHO MARYLAND MINES CORPORATION, HOMESTAKE
MINING COMPANY, BALD MOUNTAIN MINING COM-
PANY, ERMONT MINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Claims

**BRIEF FOR RESPONDENTS, BALD MOUNTAIN
MINING COMPANY (A CORPORATION) AND
ERMONT MINES, INC., IN OPPOSITION.**

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December 7, 1956

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulations Involved	2
Statement	3
Argument	7
Conclusion	12

CITATIONS

CASES:

<i>Edward P. Stahel & Co., Inc. v. United States</i> , 111	
C. Cls. 682, cert. denied, 336 U.S. 951	9, 11
<i>Kimball Laundry Co. v. United States</i> , 338 U.S. 1 ..	10
<i>Oro Fino Consolidated Mines, Inc. v. United States</i> ,	
118 C. Cls. 18, cert. denied, 341 U.S. 948	8
<i>Richards v. Washington Terminal Company</i> , 233	
U.S. 546	10
<i>St. Regis Paper Co. v. United States</i> , 110 C. Cls. 271,	
cert. denied, 335 U.S. 815	8
<i>United States v. General Motors Corp.</i> , 323 U.S. 373	10
<i>United States v. Welch</i> , 217 U.S. 333	10

CONSTITUTIONAL PROVISION:

Fifth Amendment of the Constitution of the United States	2
--	---

STATUTES:

Act of March 4, 1917, 39 Stat. 1192	2
Act of October 10, 1940, 54 Stat. 1090	2

National Defense Act of 1916, Section 120, 39 Stat. 166, 213	2
Requisitioning Act of October 16, 1941, 55 Stat. 742, as amended 56 Stat. 181	2
Second War Powers Act, Title II, 56 Stat. 177	2
Second War Powers Act, Title III, 56 Stat. 177-178	2
Selective Service and Training Act of 1940, Section 9, 54 Stat. 892	2

EXECUTIVE ORDERS:

Ex. Order 8629, 6 F.R. 191	3
Ex. Order 8875, 6 F.R. 4483	3
Ex. Order 8942, 6 F.R. 5909	3
Ex. Order 9024, 7 F.R. 329	3
Ex. Order 9040, 7 F.R. 527	3
Ex. Order 9125, 7 F.R. 2719	3
Ex. Order 9138, 7 F.R. 2919	3

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OPINIONS BELOW

The opinion of the Court of Claims is printed in Pet. App. pp. 1-50 and the opinion on rehearing is printed in Pet. App. pp. 123-130. The opinion is reported at 138 F. Supp. 281.

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1956. A motion by the United States for a new trial was denied on July 12, 1956. By order

of the Chief Justice signed on October 9, 1956, the time for filing a petition for writ of certiorari was extended to and including October 24, 1956. Respondents' time for filing a brief in opposition was extended to and including December 7, 1956. The jurisdiction of this Court is invoked under 28 USC 1255.

QUESTIONS PRESENTED

1. Whether Limitation Order L-208 was under the Fifth Amendment a temporary taking of the respondents' rights to make profitable use of the gold mining properties.

2. Whether, if there was a temporary taking, such action by the War Production Board was authorized so as to impose liability therefor upon the United States.

THE CONSTITUTIONAL PROVISION, STATUTES, EXECUTIVE ORDERS AND REGULATIONS

The Fifth Amendment to the Constitution;

§ 120 of the National Defense Act of 1916, 39 Stat. 166, 213;

The Act of March 4, 1917, 39 Stat. 1192;

§ 9 of the Selective Training and Service Act of 1940, 54 Stat. 892;

The Act of October 10, 1940, 54 Stat. 1090;

The Requisitioning Act of October 16, 1941, 55 Stat. 742, as amended 56 Stat. 181;

Title II of the Second War Powers Act, 56 Stat. 177;

Title III of the Second War Powers Act, 56 Stat. 177-178.

The Executive Orders are:

- Ex. Order 8629, 6 F.R. 191
- Ex. Order 8875, 6 F.R. 4483
- Ex. Order 8942, 6 F.R. 5909
- Ex. Order 9024, 7 F.R. 329
- Ex. Order 9040, 7 F.R. 527
- Ex. Order 9125, 7 F.R. 2719
- Ex. Order 9138, 7 F.R. 2919

STATEMENT

Respondent, Bald Mountain Mining Company, is a South Dakota Corporation and the owner in fee simple of gold-bearing lands in Lawrence County, South Dakota. Respondent, Ermont Mines, Inc., is an Oregon corporation owning a compact and contiguous group of quartz lode mining claims in Beaverhead County, Montana.

This is an action to recover just compensation under the Fifth Amendment for a taking of the respondents' right to make use of the materials, facilities, and equipment which they owned and had on hand in the operation of their legitimate and legal mining enterprises.

During the early part of World War II, Congress enacted a number of statutes which gave the President power of allocation and priority with respect to scarce materials which might be used or needed during the course of the War. Other legislation conferred upon the President the power to requisition or take by requisition or by the placing of mandatory order materials, facilities, or other things needed for national defense. The President delegated his powers under the various acts to the War Production Board or its predecessors in a series of Executive Orders. (Pet. App. p. 3 note).

The mining industry along with other industries was subject to regulations with respect to its acquisition and use of materials, supplies, and equipment needed in the defense effort. As is noted (Pet. App. pp. 4, 5) in the earlier findings in the case, the priority orders applicable to the mining industry issued prior to Order L-208 had succeeded in controlling the use of facilities, machinery, and equipment, and it was possible for this country to authorize exports of large amounts of mining machinery to foreign countries.

Copper mining and other non-ferrous metal mines were, of course, very essential to the war effort whereas it was alleged that gold mining was not. A serious manpower situation developed with respect to what is known as the non-ferrous metal mining industry. In the states where non-ferrous metal mining was an important industry, agriculture was also an important industry, and the Selective Service Board was unwilling to defer both agricultural workers and mining workers. Agricultural workers were deferred but mine labor was not. The aircraft manufacturing industry badly needed non-ferrous metal, particularly copper, but the supply of available miners was insufficient to satisfy the requirements. The rate of wages in the non-ferrous metal mines was low and working conditions were bad. There was no power in any arm of the Government to force gold miners into non-ferrous metal mines. Workers in the non-ferrous metal mines left those mines and went to the West Coast to get higher wages and better working conditions in the aircraft industry, or they stayed closer to home and found new employment in the nearby Army and Navy installations and defense projects. Similarly, some employees of the gold mines left the

gold mines in order to take advantage of war-time opportunities. However, the exodus from the gold mines was not considerable, for the reason that conditions in the gold mines were, on the whole, much better than in the non-ferrous metal mines.

The War Production Board and the armed services were concerned with the manpower problem in the non-ferrous metal mines. Everyone involved with this problem was aware of the fact that there was no legal way to force gold miners to work in the non-ferrous metal mines. Despite this fact, the idea was conceived that, if the gold mines were shut down, the gold miners would perhaps go to work in the copper mines where, however, wages and working conditions were far less desirable than in the gold mines and certainly less desirable than in other industries where the gold miners could readily get employment.

War Production Board Order L-208 was issued in the hope shared by the War Production Board and the War Department that the gold miners would go to work in the copper mines and would not go to work in the aircraft plants and shipbuilding industries. Because the War Production Board and, in fact, no agency of the Government had the right to require civilian manpower to work in any particular industry, War Production Board Order L-208 said nothing at all about manpower. The ostensible purpose of L-208 was that of allocating scarce materials, and the preamble of the Order read as follows (Pet. App. p. 86):

"The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines;

and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

The statutory authority cited at the conclusion of the Order was Section 2(a) of the Act of June 28, 1940 (54 Stat. 676).

The order falls into two parts. It prevents the gold mine owners and operators from acquiring any new equipment, materials, and facilities. To that extent the Order merely duplicated existing priorities and allocation orders although it made them more stringent. The Court of Claims held that, had Order L-208 stopped at this point, this would not have amounted to a taking (Pet. App. p. 32, 126). But the order went on to prohibit the owners of the gold mines from even using materials, facilities, and equipment which they already owned and had on hand in the operation of their gold mining enterprises. The Court held that to the extent that L-208 denied those gold mine owners the right and authority to make use of the materials, facilities, and equipment that they had on hand in the operation of their legitimate and legal mining enterprises, L-208 had the effect of depriving those gold mining owners of the right to carry on their mining enterprise, and that that right was a valuable property which, when taken, must be paid for by just compensation by the Government. The Court held that the general statutory scheme authorizing the President to take private property or to deprive owners of its effective use was sufficiently broad to constitute an authorization to the War Production Board to deprive the gold mine owners of their right to do business, and the Court concluded that the Government must pay just compensation for a taking which is authorized.

ARGUMENT

It is clear that the basic determinations made by the Court below were:

(A) To the extent that Order L-208 denied respondents the right to make use of the materials, facilities, and equipment which they owned and had on hand in the operation of their legitimate and legal mining enterprises, L-208 deprived respondents of a valuable property right, compensable under the Fifth Amendment.

(B) The War Production Board had authority under the general statutory scheme to impose liability upon the United States for the temporary taking.

This decision does not warrant review by this Court.

A. On Page 2 of the Government's Brief in Support of the Petition for a Writ of Certiorari the Government urges that Order L-208 was issued in order to "conserve scarce war materials and bring about the voluntary relocation of skilled manpower to more vital mining activities." Yet the Order contained no provision for routing scarce war materials held by gold mine owners to the more urgent users of such material. For that matter, the owners were left free to dispose of these items as they saw fit (Pet. App. p. 90). Nor did Order L-208 say anything in the preamble or in the provisions themselves about the necessity of bringing about the voluntary relocation of skilled manpower to more vital mining activities. No agency of the Government had any explicit authority to control civilian manpower during the War. The War Production Board hoped that closing the gold mines would substantially relieve the shortage of non-ferrous metal miners, but it knew or should have known that this

desideratum would not come into being. The Court of Claims made a finding that no more than 100 gold miners went into other mines and remained there for a year or more (Pet. App. p. 8). L-208 was not intended to conserve scarce war material and was foredoomed to failure in diverting manpower.

A good portion of the Government's brief is devoted to showing that the opinion of the Court of Claims in the instant case departs from some of the statements and holdings in its decision in *Oro Fino v. United States*, 118 C. Cls. 18, certiorari denied, 341 U.S. 948, and *St. Regis Paper Company v. United States*, 110 C. Cls. 271, certiorari denied, 335 U.S. 815, in which cases the claims were rejected.

These cases can be readily distinguished from the instant case. The rationale of the Court of Claims is thoroughly consistent. The *Oro Fino* case sought recovery of damages which the plaintiff incurred in protecting its property. No taking was alleged and the plaintiff did not seek to recover the value of the property taken. The Court pointed out in the *St. Regis* case that M-251 amounted to a taking of plaintiff's inventory of pulpwood. However, plaintiff in the *St. Regis* case did not sue for the taking of the pulpwood, probably because shortly after M-251 was issued, the plaintiff received what it considered just compensation for the requisition on mandatory sale to the designees. The closing of plaintiff's pulpwood plant itself was really consequential to the taking of its supply of pulpwood; therefore, it amounted to a taking which was not compensable. It clearly appears that the United States under the Second War Powers Act had a right to issue an order that during a certain period of time no plant in the certain area could consume,

process, or deliver any such pulpwood except upon a specific authorization of the War Production Board. In the instant case, as we have shown above, Order L-208 was not in fact issued to conserve critical materials needed in the defense effort. No attempt was made to requisition or otherwise purchase these materials from the mines which were closed by Order L-208. In fact, the United States exported some of these materials prior to the issuance of Order L-208 and throughout the war.

On page 12 the Government's Petition urges that there was no affirmative use or invasion of the gold mines by the Government. The Government urged the same position without success in the case of *Edward P. Stahel & Co. et al v. United States*, 111 C. Cls. 682, certiorari denied, 336 U.S. 951. In the *Stahel* case, the O.P.M. amended General Preference Order M-22 to provide that the plaintiff could not sell to anyone but the Government or persons designated by the Government. Two months after the issuance of M-22, the Government and its designees placed mandatory orders with the plaintiffs. The Court of Claims held that by its Order of October 16 the Government took the plaintiff's silk for public use. It required the plaintiffs to sell their silk, upon request, to those who would use it for the Government's purposes, or to the Government itself, and it forbade the delivery or use of the silk for any other purpose except by the specific license of the Government, which license, so far as appears, was in no case granted. Until the silk was actually taken some two or more months afterwards, there was no affirmative use of their silk. The deprivation itself was the legal taking.

The fact that there was as much gold in the mines when Order L-208 was revoked as when it was issued is immaterial. The plaintiffs are not suing for the taking of their gold, but for the right to operate their gold mines at a profit during the period of closure.

It has been held by the Supreme Court on numerous occasions that action short of acquisition of title or short of physical occupancy may constitute a taking. *United States v. General Motors Corporation*, 323 U.S. 373; *United States v. Welch*, 217 U.S. 333; *Richards v. Washington Terminal Co.*, 233 U.S. 546; *Kimball Laundry Co. v. United States*, 338 U.S. 1.

B. The second issue is whether or not the War Production Board had authority under the general statutory scheme to impose liability upon the United States for the temporary taking. Here, too, the reasoning of the Court of Claims goes to the very heart of the matter and results in a fair and equitable determination as to which there can be no room for doubt.

On page 15 of the Petition the Government urges that "the Court of Claims has ignored the significant factors that (1) the War Production Board did not have the authority to requisition property in circumstances such as are here involved and (2) that the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had." The Court of Claims did not ignore either of those factors. In the first place, the Court specifically decided that the War Production Board did have authority to requisition property in the circumstances here involved under the general statutory scheme of war-time control. The Court found that these statutes were broad and generous in their terms and required very little by way

of procedure or findings of fact, leaving such matters to the discretion of the War Production Board (Pet. App. pp. 11-12). The opinion of the Court of Claims rests squarely on substance, not shadow. The Court held that while the Board may not have intended or purported to exercise any requisitioning authority, that factor was unimportant if what the Board did amounted to a requisition and if it had authority, as the Court held it had, to requisition (Pet. App. p. 127). This is in line with the reasoning of the Court of Claims in the *Stahel* case which held that a taking in the constitutional sense occurred *ipso facto* when the Government forbade those plaintiffs from selling or delivering their silk to any user but the Government or its designees.

The Government has suggested that the Supreme Court should provide more authoritative guidance than has the Court of Claims in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency. It is difficult to conceive of a more definitive delineation between "regulation" and "taking" than that laid down by the Court of Claims in this case. In view of the fact that L-208 represents the only attempt by the Government agencies in peacetime or wartime to regulate by immobilization, it seems clear that the distinction between regulation and taking discussed by the Court of Claims was one of which those agencies were aware. Any holding other than that of the Court of Claims would open the door to wholesale violation of constitutional rights by war agencies of the Government in the name of expediency rather than by due process of law.

CONCLUSION

The opinion of the Court of Claims to which the Government excepts is a careful and detailed analysis of the whole controversy. The Court makes clear, practical, and just distinctions between a regulation, a taking, and consequential injury, and between authorized and unauthorized takings. It provides sound guidance in this field for the foreseeable contingencies of the future.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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